

Arbitration - Ecuador

Court prevents a disrupting strategy to derail arbitration

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Introduction

The Guayaquil Provincial Court ruled on an attempt made by a party to an arbitration agreement to divert a case that was being heard by an arbitral tribunal to a judge. The petitioner had filed a competence action before a first instance civil judge, arguing that a judge – and not an arbitration tribunal – should hear the case. However, the provincial court reaffirmed the rule established in the Law of Arbitration and Mediation that directs judges not to accept actions related to disputes that parties have contractually agreed to arbitrate. It is expected that this ruling – and particularly the fine that it imposed on the judge who accepted the competence action – will deter the adoption of this strategy, which affects the natural course of arbitration proceedings, in the future.

Facts

A commercial corporation had signed a lease agreement with the property owner of a building in the city of Guayaquil. The parties had agreed that any dispute related to the interpretation or application of the contract would be submitted to and settled by the arbitration tribunals of the Guayaquil Chamber of Commerce's Mediation and Arbitration Centre. A dispute arose between the parties and the lessee of the premises commenced arbitral proceedings under the rules of that centre. A tribunal of three arbitrators was established after a mediator failed to settle the case.

Part of the lessor's defence included the arbitrators' lack of competence. In accordance with the arbitration and mediation law, the tribunal made a determination on its own competence in the first hearing. The tribunal found that it had competence to hear and rule on the case and issued procedural orders to organise the proceedings. It was at this point that the defendant decided to bring a competence action against the director of the arbitration centre and the arbitrators themselves.

Under the rules of civil procedure, a competence action seeks to have an ordinary judge that is hearing a case halt the proceedings and hand over the case to another competent judge.⁽¹⁾ If the judge with whom the action is filed finds that the petition has merit, he or she will then announce his or her competence to the judge who is hearing the case. If the latter files an opposition to the petition, then the conflict between the two judges will have to be settled by the higher court.⁽²⁾

The competence action was established by Ecuadorian law and it has always been understood as a mechanism to settle a conflict of competence between two domestic and ordinary judges for reasons such as:

- territory;
- subject matter;
- hierarchy; or
- the personal status of the parties involved.⁽³⁾

Until the case at hand, it had never been used to challenge the competence of arbitrators.

In the present case, the arbitrators refused to decline their competence to hear the case in favour of the first instance civil judge. Although the provincial court is not considered

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by law as a higher court with respect to arbitral tribunals, the unusual conflict of this case meant that it was submitted to one of its chambers for resolution.

Decision

The court heard the arbitrators' position, as well as that of the judge who claimed to have competence to hear the contractual dispute.⁽⁴⁾ In denying the competence action filed by the lessor, the provincial court did not elaborate in terms of legal arguments. In its decision, the court focused first on the rules of the Code of Civil Procedure applicable to the case. It began by observing that under Article 18 of the code, the source of 'conventional jurisdiction' is the agreement between the parties. It then went on to note that according to Article 17, 'judge arbitrators' (as the code terms arbitrators) are empowered with conventional jurisdiction – as opposed to ordinary judges whose jurisdiction is statutory. The court also invoked Article 29, which recognises that judges to whom the defendants have expressly submitted in a contract are as competent to hear a complaint as other judges, such as the judge of the defendant's domicile.

After noting that the parties had contractually agreed to submit any disputes to an arbitral tribunal – a fact that by itself triggered the application of Article 29 of the code – the court focused on certain provisions of the arbitration and mediation law which deal with the same issue. Here, the court limited itself to reciting Article 5, which defines the term 'arbitration agreement', and Article 7, which directs ordinary judges to refrain from hearing complaints related to disputes which the parties have submitted to arbitration.

The court dismissed the competence action filed by the lessor against the arbitral tribunal. However, it took a further – and rather unusual – step: it also fined both the judge who did not initially reject the action and the party that commenced the action.

Comment

Although the court missed an opportunity to further analyse the law that was applicable to this case, including the principle of 'competence-competence' embodied in Article 22 of the arbitration and mediation law, its ruling is a welcome development in support of arbitration.

The issue of arbitrators' competence may emerge when a defendant answers the arbitration claim, in which case it is the arbitral tribunal which must rule on its own competence. The fact that the code refers to arbitrators as 'arbitrators judges' in rather old-fashioned terms does not justify attributing mechanisms (eg, the competence action) to arbitrators which were designed to solve conflicts within the context of the judiciary only.

It is hoped that the fine imposed on the judge who accepted to hear a complaint that grossly contradicted the legal prohibition of the arbitration and mediation law will deter future attempts to abuse what is an otherwise valid mechanism.

In the case at hand, in compliance with the code, the arbitral proceeding was suspended for more than six months, which was the length of time that it took the provincial court to hear the parties and issue its final ruling.

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Endnotes

(1) Code of Civil Procedure, Article 848.

(2) Code of Civil Procedure, Article 850.

(3) Code of Civil Procedure, Article 1.

(4) Guayaquil Provincial Court, case no R-072-2011. *Competencia*.

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